Supreme Court of the United States,

OCTOBER TERM, 1900.

No. 504.

JOHN D. WALL AND THOMAS W. HUSKE, TRADING AS WALL & HUSKE, APPELLANTS,

vs.

WALTER O. COX, TRUSTEE OF W. H. GILBERT, TRADING AS WINSTON HARDWARE COMPANY AND AS GILBERT HARDWARE COMPANY.

BRIEF OF APPELLANTS.

Wall & Huske, appellants, respectfully present the following in support of their contention:

STATEMENT OF FACTS.

The record in this cause supporting the questions, certified for the consideration of this court, presents the following facts:

That W. H. Gilbert, a citizen of Winston, N. C., was doing a hardware business in said city, and on the 11th day of October, 1899, sold and delivered to Wall & Huske, hardware merchants in the same town, a stock of goods,

consisting of hardware, and executed to the said Wall & Huske a bill of sale therefor:

That thereafter, to-wit: on the 13th day of October, 1899, certain creditors of W. H. Gilbert filed a petition in the District Court of the United States for the Western District of North Carolina, sitting as a Court of Bankruptcy, asking that said W. H. Gilbert be declared a bankrupt: That on the 14th day of October, 1899, His Honor, H. G. Ewart, Judge of the United States District Court, made an order in said bankruptcy proceedings, restraining Messrs. Wall & Huske from disposing of said stock of goods until the further order of the Court, and on the 27th day of October, 1899, said Court declared W. H. Gilbert a bankrupt, and on the 6th day of November, 1899, said Court, by order, restrained said Wall & Huske from further disposition of the goods "until the appointment and qualification of a trustee of W. H. Gilbert, bankrupt".

Said order further provided, that,

> "Upon the appointment and qualification of said Trustee, in a proper case and upon the proper showing, an injunction or restraining order may be obtained upon application, in which Wall & Huske, defendants above named, may be made parties, restraining the sale or other disposition of any of the property until a hearing may be had and the matter at issue determined either by a suit in equity or action at law in the United States Courts or the Courts of the State, as petitioners may be advised."

That on the 23rd day of November, 1899, W. O. Cox was, by the creditors of the said W. H. Gilbert, bankrupt,

duly elected as Trustee of said bankrupt, and duly qualified as such, and on the 6th day of December, 1899, began a suit in equity, and duly filed in the District Court of the United States for the Western District of North Carolina, sitting as a Court of Bankruptcy, a Bill of Complaint, and caused a subpœna to be issued and the same duly served on Wall & Huske; in which suit, he sought to set aside the sale of the goods to Wall & Huske, as fraudulent and void, and to recover the said stock of goods.

On the Bill of Complaint and a supplemental complaint filed by complainant in this suit, His Honor, Judge Ewart, by an order, dated December 16th, 1899, restrained the said Wall & Huske from disposing of said stock of goods until the further order of the Court, and ordered notice to be given them to show cause why a Receiver should not be appointed of said stock of goods.

The defendants expressly declined to consent to the jurisdiction of the United States District Court, and demurred to the Bill of Complaint, alleging as a cause of demurrer:

> First—That the District Court of the United States had no jurisdiction to entertain a plenary action for the recovery of the said stock of hardware against the defendants, Messrs. Wall & Huske.
>
> Second—That if the Court had jurisdiction to entertain a plenary suit between the Trustee and a third person claiming title to said property, that the action should be by an action at law, and not by a suit in equity.

That W. H. Gilbert, W. O. Cox, Trustee, and Wall & Huske were, at all times during the pendency of the action aforesaid, citizens of the State of North Carolina, and residing in the Western District of said State.

Pursuant to notice and order of the Court heretofore made, the cause, on the Bill of Complaint and on demurrer of defendants, was duly heard at Chambers in Winston, N. C., on the 9th day of January, 1900; all parties being represented by counsel.

Complainant moved for an injunction until the final hearing of the cause and for a Receiver. His Honor, on the 15th day of January, 1900, filed an order in said cause, granting an injunction and appointing a Receiver, as appears of record.

Appellants, Wall & Huske, sought to have the order of His Honor, Judge Ewart, reviewed in the Circuit Court of Appeals for the Fourth Circuit, and the cause was heard as on appeal by said Circuit Court of Appeals, at the February Term, 1900, and a judgment of said cause filed on May 1st, 1900, sustaining the order of the United States District Court appealed from, and declaring that the District Courts of the United States had jurisdiction to entertain a plenary suit in equity to recover the stock of goods from Wall & Huske.

Federal Reporter, vol. 101, page 403.

On the decision of this Court in Bardes vs. National Bank of Hawardin, U S. Rep., vol. 178, page 524, presently filed, a motion to rehear the cause was heard at November Term, 1900, of said Circuit Court of Appeals. On this motion, the Court sends its certificate to this Court asking on the record, its direction, and submitting two questions, as follows:

FIRST—Under the facts and the pleadings above stated, had the District Court of the United States for the Western District of North Carolina jurisdiction over the controversy?

SECOND—Said District Courts having adjudicated bankruptcy on account of an alleged fraudulent transfer of the bankrupt's property, and having appointed a Receiver to hold the estate thus conveyed, had it, in said proceedings or in ancillary proceedings, instituted either by the original petitioners, the receiver of the court, the bankrupts trustee, or of the courts own motion, jurisdiction to bring in the alleged fraudulent transferree of the property, thus in the courts possession, and do full and complete justice in one litigation?

FIRST QUESTION.

The first question is as follows:

> *Under the facts and the pleadings above stated, had the District Court of the United States for the Western District of North Carolina jurisdiction over the controversy?*

The record of the cause in this Court clearly shows that the first question is

> "Can the District Court of the United States entertain jurisdiction over suits brought by a trustee in Bankruptcy to set aside fraudulent transfers of property made

by the bankrupt to third parties, before the institution of the proceedings in bankruptcy?"

The answer is squarely given in the decision of this Court in Bardes vs. Bank of Hawardin *supra*, in which the same question and other similar questions are discussed, and the decision of this Court, after consideration of all of the provisions of the Bankrupt Act relating to jurisdiction under said act, says, that the United States Court has no jurisdiction.

STATUS OF DECISIONS BEFORE BARDES CASE.

Before the rendition of the decision by this Court in Bardes vs. Bank *supra*, there was some diversity of opinion in the Courts of the United States as to the right of the Trustee in Bankruptcy to bring such plenary suit, and Sec. 23, Sub Sec. b, was differently construed.

Among the decisions of the United States Court cited as authority for such jurisdiction are the following:

In re Gutwillig, Fed. Rep., vol. 92, page 337.
Davis vs. Bohl, " " " 92, " 525.
In re Fixen, " " " 96, " 753.
In re Richards, " " " 94, " 636.
In re Newberry, " " " 97, " 24.
Carter vs. Hobbs, " " " 92, " 59.
In re Seivers, " " " 91, " 366.
and others.

Contra,

In re Abraham, Fed. Rep., vol 93, page 768.
Burwell vs. Merchantile, Fed. Rep., vol. 91, page 365.

Mitchell vs. McClure, Fed. Rep., vol. 91, p. 621,
Hicks vs. Knost, " " " 94, p. 625,
Heath vs. Shaffer, " " " 93, p 647,
and others.

The above cases are not mentioned herein as authority, but merely for the purpose of showing the conflict of opinion before this Court had spoken and defined the jurisdiction of the United States District Court in such suits.

It was contended by the appellee and intimated by one of the members of the Circuit of Appeals on the rehearing, that the proceedings in which W. H. Gilbert was declared a bankrupt was an *involuntary* proceeding, which distinguished this case from Bardes vs. Bank and Mitchell vs. McClure and Hicks vs. Knost, which two last-named cases follows the first named case in U. S. Rep., vol. 178. Nowhere in the provisions of the Bankrupt Act can you find such a distinction. The language of the Statute is,

"Suits by Trustees shall only be brought", etc., see Sec. 23, b. Not a word is contained in the Act of Congress intimating that any difference between a *voluntary* proceeding and an *involuntary* proceeding is contemplated by the Act. No reason can be given why the manner in which the debtor was declared a bankrupt, should change the jurisdiction of the Court in a suit by the Trustee: certainly it can make no difference to the defendant in such a suit, as he was a stranger to the bankruptcy proceedings, and had nothing to do with the mode in which the debtor was declared a bankrupt, or of the appointment of a trustee. Any rights which the defendant had under the provisions of this Act of Congress, should not be prejudiced by the conduct of others in a proceeding to which he was not a party. This attempted distinction has

found no weight with the Court, so far as I can discover: The contrary is held by Judge Lowell, District Judge of Massachusetts.

In re Ward, Fed. Rep., vol. 104, page 985.

In this interesting opinion of Judge Lowell, he discusses the suggested distinction of voluntary and involuntary proceedings, and concluded there is nothing in such a distinction warranted by the act or by reason.

It was contended by Apellee that when the specific Act complained of as fraudulent was itself the "act of bankruptcy" that the United States District Court had jurisdiction in such cases to entertain a plenary suit. But in Bardes vs. Bank, *supra*, the act complained of was an "act of bankruptcy", and this Court denies jurisdiction to the District Court aforesaid.

SECOND QUESTION.

The second question is as follows:

> *Said District Court having adjudicated bankruptcy on account of an alleged fraudulent transfer of the bankrupt's property, and having appointed a receiver to hold the estate thus conveyed, had it, in said proceedings or in ancillary proceedings instituted either by the original petitioners, the receiver of the Court, the bankrupt's trustee, or of the Court's own motion, jurisdiction to bring in the alleged fraudulent transferee of the property, thus in the Court's possession, and do full and complete justice in one litigation?*

The modes of procedure in Bankruptcy Proceedings elicited from this Court by this second question, I respectfully submit, are not raised by this record, and whether this Court will give direction for the conduct of parties under a different state of facts, I do not infer from its former rulings. There is only one question presented by the record as I understand it, and that question is contained in the first question heretofore discussed.

The record on page 17 says:

> "It is agreed that the cause was heard before His Honor, Judge Ewart, on demurrer of defendants to the jurisdiction of the United States District Court, and that the cause was heard before the United States Circuit Court of Appeals on demurrer to the jurisdiction of the United States District Court."

That the matter of the jurisdiction of the United States District Court to entertain a plenary suit to set aside a transfer of property by the bankrupt to a third party made before the institution of bankruptcy proceedings was the sole question considered, or raised by the record, we respectfully refer to the opinion of Judge Waddill in this cause.

Fed. Rep., vol 101, page 403.

Where the Circuit Court of Appeals decides only the one question as to the right of the United States District Court to entertain a plenary suit by Cox, Trustee, to recover the goods from Wall & Huske.

A careful examination of the record sent to this Court

will disclose that there were no facts in this case which present the Second Question, or make its answer necessary to a determination of the case at bar.

The second question pre-supposes that the Court adjudicating the bankruptcy, had in the bankruptcy proceedings taken charge of the property and appointed a receiver and had the property in its possession. The question is then asked:

Would the Court not bring in the parties, Wall & Huske, and adjudicate their rights in one action?

This does not comport with the facts. The Bankrupt Court was not in possession, or charge of the property; nor was a Receiver appointed of the property in said bankruptcy proceedings, but on the other hand, the property, according to the record and the truth, was in the actual possession of Wall & Huske, when this bankruptcy proceeding was instituted; also when the debtor was declared a bankrupt; also when the trustee was appointed; and also when the suit was instituted by the trustee for its recovery. Further, the appointment of the receiver was not made in the bankruptcy proceeding at all but was made in the equity suit of Cox, Trustee, vs. Wall & Huske by motion in said suit, which motion was made by complainant Cox, Trustee; and the very question at issue is: Did the Court have jurisdiction to entertain the suit of Cox, Trustee? If it did not, then the suit fails and all orders in said suit are void and the appointment of a Receiver in said suit is void. The record says:

> "The motion for receiver and injunction was heard before His Honor, H. G. Ewart, Judge, at Winston, N. C., on the 9th day of January, 1900, on the bill of complaint, supplemental bill of complaint of Cox,

> Trustee, and the plea and demurrer of Wall & Huske; affidavits of both sides in support of and against motion for Receiver. Argument of counsel was made on both sides. On the 15th day of January, 1900, His Honor rendered judgment, overruling the demurrer of Wall & Huske and appointing a receiver, as appears from the following order:"

It is true there was an injunction issued by the District Court, on motion of the petitioners, in the bankruptcy proceedings, restraining Wall & Huske from disposing of the property and this order was made before the institution of this suit, but the District Court or Bankrupt Court did not take charge of the property, for in the order of the District Court, Wall & Huske were restrained from disposing of the property, "Until the appointment and qualification of a Trustee, * * * who might seek to recover the property by bringing his suit in equity or action at law in the United States Courts or the Courts of the State as petitioners might be advised".

The Trustee was duly appointed and qualified, brought his suit in equity in the United States District Court to declare void the transfer from Gilbert to Wall & Huske and to recover the stock of goods. In this suit, according to the opinion of this Court, he sought the wrong forum.

In this case Wall & Huske had purchased the stock of goods from one Gilbert, and had them in possession, subsequently Gilbert was adjudicated a bankrupt on petition of his creditors; the Court, at the instance of the creditors, restrained Wall & Huske from disposing of said goods until a proper party, to-wit, a trustee in bankruptcy could be appointed, that such trustee might, in the proper court,

test the validity of the purchase by Wall & Huske. There was no taking the property by the referee of the Court or by any one else, as the property of the bankrupt, and the property never got into the Bankrupt Court as the second question pre supposes, but the property was in the possession of Wall & Huske and so remained until it was taken into possession by a Receiver of the United States District Court appointed by motion in the cause of Cox, Trustee, against Wall & Huske, a suit instituted for the purpose of getting the property.

Again, the second question pre-supposes that the Bankrupt Court was in possession of the property.

Now, the suit of Cox, Trustee, was brought against Wall & Huske and the Bill of Complaint alleges that Wall & Huske "went into possession of the entire property" as aforesaid.

The Bill of Complaint further alleges:

> Your orator further shows to your Honor that he has requested the respondents J. D. Wall and T. W. Huske, partners, trading as Wall & Huske to deliver up the said property to him as such trustee, * * * * and surrender up and cancel the paper writing purporting to be a deed or bill of sale for same. * * * * * That the respondents allege and pretend that the transfer, conveyance, and assignment is valid, * * * * * and that by reason of said conveyance, * * * * * they acquired title to said property therein described, and that they were purchasers in good faith and for a present fair consideration
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> Record, page 5.

> Your orator further charges that the said respondents are threatening to intermingle and move and have already intermingled a portion of this stock of hardware with their own stock of hardware: that they are threatening to sell and dispose of and have disposed of a portion of the said stick: that they have collected and are threatening to collect the account due and owing the said bankrupt, W. H. Gilbert.
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> Record, page 8.

Now, according to complatnants' own allegations set forth in his bill, Wall & Huske were, at the time of filing the same, in possession of the stock of goods, treating them as their own, refusing to surrender them to Cox, Trustee, and the prayer of complainant Cox is, that the goods be recovered by him. This being true, how is it possible for the goods to be in the possession of the Bankrupt Court at the time of the institution of the suit by Cox, Trustee?

As a matter of fact the goods at that time were in possession of Wall & Huske, and they parted with their possession only by an order of the Court made in the suit of Cox, Trustee.

This Court holds that the suit by Cox, Trustee, was brought in the wrong forum.

This being true, it would indeed be a strange doctrine if, by the appointment of a Receiver in a void cause, the void cause became a vitalized and valid cause, and the Court acquired jurisdiction and could then proceed to adjudicate the rights of the parties.

This is to say: *the Court appointed a Receiver because it had jurisdiction, and had jurisdiction because it appointed a Receiver.*

While it does not directly say so, the second question leaves the impression that a receiver of the stock of goods was appointed in the Bankruptcy Proceedings. This is not true, as hereinbefore stated, and the record shows that a receiver was appointed in the plenary suit in equity, the very suit, which this Court says, the United States District Court cannot entertain.

The effort of appellee is to show that the property is part of the bankrupt's estate,—in possession of the Bankrupt Court,—and cannot be gotten out of its possession, as decided by this Court in White vs. Schloerb, 178 U. S. 542, and the Court can proceed to administer this estate. This position is based on a false premise.

The Bankrupt Court is not in possession of the property as part of the bankrupt's estate, neither the bankrupt himself, the receiver, trustee, or a receiver appointed in the bankruptcy proceedings, ever had the property in possession; but after the due appointment of a trustee in bankruptcy, this trustee sought to get the property from Wall & Huske who claimed it as their property under a sale by the bankrupt to them before any proceedings in bankruptcy was started, and this trustee brought his suit, and on this suit a receiver was appointed. Now, could the trustee bring this suit in the United States District Court? If he could not, the suit fails, and all done under it fails. If the Bankrupt Court had the property rightfully in its possession it could administer it; but can it wrongfully obtain it and keep its custody against the protest of a third party claiming it?

The entire case is this: Gilbert made a transfer of a stock of goods to Wall & Huske, after the transfer Gilbert was adjudicated a bankrupt, a trustee was appointed, creditors believed that the sale by Gilbert was a fraud, Wall & Huske contended it was no fraud, that the goods

belonged to them. Now, how can this alleged fraudulent transfer be set aside and the goods recovered by the trustee?

This is the plain question:

Can the property be taken by any summary process of the Bankrupt Court? No.

Can the property be recovered by the trustee in a suit in the United States District Court without the consent of the defendant? No.

Then this is asked: If the Trustee takes the porperty by a suit brought in direct violation of the law and the Court in this manner gets possession: why can it not, by some ancillary process, keep the property and administer it? Of course such proceeding is a clear subterfuge, an effort to evade the plain provision of the law as to the manner in which property claimed by a third party can be brought into the Bankrupt Court, under the provisions of the Bankrupt Act.

Judge Lowell, *In re Ward, Supra*, speaking of Bardes vs. Bank, says:

> The decision of the Supreme Court has so gravely modified the theory of jurisdiction in bankruptcy previously held by all these courts, that their practice prior to that decision affords little support for a continuance thereof. In the case above cited, the Supreme Court actually decided that a District Court has no jurisdiction, except by defendant's consent, of a suit brought by a trustee in bankruptcy to set aside a fraudulent transfer made by the bankrupt to a third party before the institution of bankruptcy proceedings.

And further,

> Counsel for the petitioners urged that the Supreme Court passed only upon the jurisdiction of this Court over plenary suits and that the jurisdiction by summary process was left undisturbed. It would be strange, however, if a Court be without jurisdiction to determine the title or to affect the control of property by a plenary suit, where all parties must be fully heard, and yet has jurisdiction on summary process, and without hearing, to take possession of the same property or to restrain its use. I do not understand that the Supreme Court has held that the District Court may do by summary process that which it is forbidden to do in a plenary suit. The case of White vs. Schloerb, 178 U. S. 542, 20 Supreme Court 1007, 44 L. Ed. 1183, held only that, after property had once passed into the custody of a Court of Bankruptcy by the Referee's taking possession of it, it was not open to seizure by a State Court on writ of replevin, and, if so seized, could be retaken by the Court of Bankruptcy by summary process. The case has no application to property which has never been in the possession of a Court of Bankruptcy.

The Bankrupt Act, Section 23, Sub-Sec. b, points out the way in which a trustee can bring a suit to recover property in the possession of a third party claiming it, and this Court, in Bardes vs. Hawardin Bank *Supra*, denies jurisdiction of such suits to the United States District Court, and expressly gives it, in such instances as the case

at bar, to the Courts of the State in which the parties reside.

Should this Court think that the second question is in any way raised by the record, and is a matter for its consideration, we respectfully suggest that the answer to the first question is *a fortiori* an answer to the second question.

To say that the United States District Court cannot entertain a suit by a trustee to recover property in the hands of a third party claiming it adverse to the bankrupt, answers the second inquiry, asking if the United States District Court cannot do the same thing by some summary or ancillary proceeding.

In a plenary suit by the trustee, all parties are before the Court in the regular way, and can make such proper defense as they are entitled; certainly if the United States District Court has no jurisdiction of such suit except by defendant's consent, it cannot, by any ancillary, *ex parte*, or summary mode of procedure take jurisdiction and decide on the same matter between the same parties, without their consent.

This would be to accomplish by indirection that which could not be accomplished by a direct proceeding, and would render of no avail the express limitation to the jurisdiction of the United States District Court, provided by the Section of the Bankrupt Act aforesaid.

REPLY TO BRIEF OF APPELLEE.

Under an agreement of counsel in this cause, a copy of which is attached to this brief as an appendix, the counsel of appellant has a right to reply to the brief of appellee, and now respectfully submits the following:

STATEMENT OF FACTS.

The appellee under the above heading, sets forth largely

the contents of the Bill of Complaint filed, and states at length the facts which he desires to prove in sustaining the prayer in his bill. Such allegation of facts cannot be material or pertinent to the question as to whether the United States District Court has jurisdiction over the controversy. Appellee further says:

> "On November 6th, 1899, a Receiver was appointed in the Bankruptcy Proceedings by Judge Ewart, and an injunction was issued against the said Wall & Huske, enjoining them from interfering with the property until the election and qualification of the trustee of W. H. Gilbert, and the trustee was ordered to bring suit in the United States Court or the Courts of the State to determine the matters in controversy.
>
> ("The order appointing the Receiver does not appear in the Record, but the fact that a Receiver was appointed and took possession of the property appears fully from the finding of the fact by Judge Waddill, in rendering the opinion of the Circuit Court of Appeals in this cause, as will appear by an inspection of same at Page 410, Vol. 101, Federal Reporter, and as appears as a fact found in the questions certified.")

The above is an extraordinary statement. We do not know who prepared the brief of Appellee on this point, but we hardly think it could have been the counsel who has been appearing in this cause from the beginning, as the statement herein, that a Receiver was appointed in

the Bankruptcy proceedings on November 6th, 1899, is wholly untrue. And, it is wholly untrue that at *any time* in the Bankruptcy Proceedings a Receiver was appointed of the stock of goods claimed by the defendants, Wall & Huske, and sought to be recovered in this controversy: and it is wholly untrue that such receiver, (meaning a receiver appointed in the Bankruptcy Proceedings,) took possession of the property aforesaid. On the other hand, no Receiver was ever appointed of the stock of goods, except the receiver appointed by the Court in the suit of Cox, Trustee v. Wall & Huske; which receiver was appointed by motion in said cause by his Honor, Judge Ewart, by order dated January 15th, 1900. The record discloses this to be true, and no where in the record can be found anything to contradict this statement. As a matter of fact, there was no appointment of any such receiver as contended by Appellee, and should this Court see fit to stray out of the record and send for all of the orders, decrees and papers of every kind made in this suit, or in the Bankruptcy Proceedings, no such order could be found in the Bankruptcy Proceedings appointing a Receiver of the stock of goods in the possession of Wall & Huske, for the simple reason that none was ever made We again respectfully call the attention of the Court to the Record.

Appellee says in his brief, that a Receiver appointed in Bankruptcy Proceedings took in his possession the property and intimates that the property was in the possession of such Receiver at the time of the institution of this suit, and that the property was in the hands of the Bankrupt Court, meaning that it had possession of the RES, and having possession of the res, had jurisdiction to entertain this suit. This is not true. The record says, " the defendants, Wall & Huske, at the time of filing the subpœna and Bill of Complaint and Supplemental Bill of Complaint,

were in possession of the stock of goods, holding same under a Bill of Sale from W. H. Gilbert." Here it will be seen that the brief of Appellee is squarely contradicted by the Record. The authority to which Appellee refers, upon which he bases the statement that a Receiver was appointed in the bankruptcy proceedings and took possession of the property, is an expression in the opinion of the Circuit Court of Appeals rendered by Judge Waddill in this cause, overruling the demurrer of defendants, and is also to be found in the framing of the second question certified to this Court. We will refer to these matters later.

Appellee further says, the defendants filed an answer and also a pleading which they called a Plea and Demurrer. No answer was filed, as reference to the record will show, but there was filed a pleading called a Plea and Demurrer, which raises the question of jurisdiction, and expressly states "THAT THE DEFENDANTS DO NOT CONSENT TO THE JURISDICTION OF THIS COURT."

At the hearing before the Court in the plenary suit on motion for a Receiver and injunction, his Honor, Judge Ewart, made the following order:

> "In the above entitled cause the plea to the jurisdiction of the Court, filed by respondents, is overruled. On the reading and consideration of the bill of the plaintiff and answer of respondents, it is ordered, adjudged and decreed that the injunction issued by this Court December 16th, 1899, be continued until the final hearing of this cause, and the respondents are hereby enjoined and restrained from interfering in any manner with the stock of goods described in the bill of the plaintiff, the same being the identical

stock of goods alleged to have been purchased by the respondents of W. H. Gilbert, Bankrupt.

Samuel F. Vance, of the city of Winston, N. C., is hereby designated and appointed as temporary Receiver to take into his possession the said stock of goods described in the bill of complaint."

The above order clearly shows that the questions raised by defendants, on the motion to appoint a receiver and for injunctive relief, were, first, the question of jurisdiction of the United States District Court, wherein defendants, Wall & Huske, attempted to show that the Court had no jurisdiction under the Bankrupt Act to entertain the suit "Without the consent of the proposed defendants," and that the proposed defendants expressly witheld their assent to the jurisdiction; and, secondly, if the Court should hold it had jurisdiction to entertain the suit, and could in the suit consider a motion to appoint a receiver and grant an injunction, defendants filed affidavits and exhibits showing why the receiver should not be appointed. The Court in the order above set forth inadvertently uses the word "answer," but no answer was filed as the record shows.

REPLY TO ARGUMENT OF APPELLEE.

It seems from the brief of appellee that he admits the argument of defendants, and admits that under the doctrine of Bardes vs. Bank, the District Court of the United States has no jurisdiction to entertain a plenary suit against the defendants in this case, but alleges further three reasons why the case at bar is not controlled by the doctrine of Bardes vs. Bank, and that the District Court

has obtained jurisdiction by reason of the conduct of defendants, which three reasons are as follows:

First—That the question of jurisdiction cannot be raised by demurrer, but can only be raised by plea in abatement.

Second—That defendants have, by the form of their plea, and by appearing, consented to the jurisdiction of the United States District Court to entertain a plenary suit against them.

Third—That the Bankrupt Court being rightfully in possession of the *res*, can administer it, and can entertain this suit by the Trustee against Walle & Huske to try the title to the property.

We will take up the questions in the order named.

First—That the question of jurisdiction cannot be raised by demurrer, but can only be raised by plea in abatement.

To support this doctorine, appellee says that the practice of the United States Courts will conform as nearly as possible to the practice of the State Courts, and cites some authorities from the Supreme Court of North Carolina in support of his contention, and that a plea in abatement is the proper course under the practice in North Carolina. The authorities he cites are not in point. The question raised in each of the cases cited is not one of jurisdiction of the subject matter, or of the person, but is simply a question of *venue*—whether a cause could be removed from one county to another. This law of *venue* must be taken advantage of by a plea in abatement under the laws of North Carolina, because if plaintiff is permitted to try his case, lose it, and then take advantage of the wrong venue, he could have two trials in different places of the same cause.

We think the distinction is clear between a plea to the jurisdiction of the subject matter or person and a plea to the venue. If the practice of the United States Courts should conform to the State Courts in this respect, it is clear that the defendants in their plea to the jurisdiction by way of demurrer, is correct. Such is the doctrine in North Carolina.

The Code of North Carolina expressly says:

> "The defendants may demur to the complaint when it shall appear upon the face thereof, either:
>
> "(1) That the Court has no jurisdiction of the person of the defendants or of the subject matter of the action."
>
> The Code, section 239.

The uniform decisions of the Court are in harmony with this provision of the Code. In the cases cited by appellee from the Supreme Court of the United States all are upon the same line, and are merely questions of venue. In the case of DeSobry vs. Nicholson, 3rd Wallace, 423, the Court says: "In equity the defense must be presented by plea or demurrer, and not by answer." This is an equity case.

Second—"That defendants have by the form of their plea, and by appearing, consented to the jurisdiction of the United States District Court to entertain a plenary suit against them."

The following, which we take from the record, shows to the Court the circumstances under which defendants have appeared in this cause:

The trustee in bankruptcy, having been selected by the creditors, elected to bring suit, and did bring suit, in the United States District Court to recover the goods then in the possession of defendants, and in that suit moved for the appointment of a receiver of the property and for an injunction. The defendants appeared in obedience to the notice of this Court and defended as follows:

1st: Denied the jurisdiction of the Court to entertain such suit; and

2nd: Filed affidavits tending to show that no receiver should be appointed.

It will be noted that the time for filing pleadings on the part of defendants had not come in the ordinary course of the Court; they appeared to defend their rights in an ancillary motion in the original cause, and denied the jurisdiction of the Court to entertain the cause.

The complainant used his supplemental bill as an affidavit in support of his motion aforesaid. The defendants, in addition to the affidavits filed in their behalf as aforesaid, filed the pleadings set out in the record entitled "Plea and Demurrer," raising the question of jurisdiction, and in the plea stated that the defendants did not consent to the jurisdiction of the Court. This pleading may have been inartificially drawn, but it will be remembered that the act of Congress had been only recently passed, the practice new, and such decision as had been rendered on the provisions of the act conflicting and inharmonious. The motion "was heard before His Honor, Judge Ewart, on demurrer of defendants to the jurisdiction of the United States District Court; and the cause was heard before the United States Circuit Court of Appeals on demurrer to the jurisdiction of the United States District Court, without objection from complainant as to form of

plea, except complainant did make this objection on the argument made on the re-hearing." (The record, page 17.)

It will be seen from the judgment of the District Court, that the question of jurisdiction was raised in that Court without objection to form of plea; it will be seen from the judgment and opinion of the Circuit Court of Appeals, that in considering the matter before that Court, no question was raised as to form of plea; and that only on the re-hearing of the case, after the opinion of Bardes vs. Bank had been published, do we hear from complainant any such objection as they now attempt to present to this Court, and even at that time nothing of any kind was said to show or to inform the Court or the parties the nature of such objection. It would seem that if any rights have been waived, complainant has waived any rights he may have had to the form of defendant's plea.

A parallel of the supplemental bill and defendant's plea is made for the purpose of showing that the plea was really an answer. It will be seen by reading defendant's plea and the allegations and admissions therein, it was solely a plea to raise the question of jurisdiction; the plea frankly admits the facts of nearly every paragraph of the supplemental bill, in order that the matter might come squarely before the Court on the question—whether the United States District Court had jurisdiction to entertain the suit, when the defendants expressly refused its assent to such jurisdiction.

No answer was filed to the original bill, which was full and extensive, containing much matter and a "number of interrogatories required to be answered by J. D. Wall and T. W. Huske respectively;" all of which interrogatories are omitted from the record as unnecessary to the decision of the question presented. (Record, page 10.) The conduct of the defendants was, therefore, in obedience

to the notice to show cause why a receiver should not be appointed of their property—to come before the Court and expressly withhold their consent to the jurisdiction, and on this express denial of consent to plead to the jurisdiction of the Court. Under Bardes vs. Bank, *unless the consent of the defendants was obtained, the Court should have instantly dismissed both the cause and the motion.* But this the Court declined to do and proceeded to take up the question of appointing a receiver of the defendants' property. This motion these defendants contested by filing affidavits showing the complainant under no circumstances was entitled to have the property of these defendants taken from them.

In Bardes vs. the Bank, this Court says:

> "The District Court of the United States can, by the proposed defendants consent, but not otherwise, entertain jurisdiction over suits brought by Trustees in Bankruptcy to set aside fraudulent transfers of money or property, made by the bankrupt to third parties before the institutions of proceedings in bankruptcy."

It is clear from the provision of the Bankrupt Act, Section 23, Sub sections a and b, and the enunciation of this Court, that the jurisdiction of the United States District Court can only be obtained by defendants consent; this Court has no jurisdiction to entertain such a suit unless the defendants consent to be sued in such Court. In this case defendants in their first appearance before the District Court, which was on a motion for a Receiver, expressly refused this consent; and contended that the Court had no jurisdiction. Thus far certainly the

District Court had no jurisdiction, and should have dismissed the case. Indeed, from a fair construction of the act, unless the consent of defendants appeared affirmatively, the Court had no jurisdiction. Yet it is contended by Appellee that the pleading entitled "Plea and demurrer" filed by defendants in this motion is a plea to the merits of the case and a consent to the jurisciction of the United States District Court.

This position is not tenable,

First. The act is one of general jurisdiction and defendants consent is necessary to permit the United States District Court to entertain a Plenary Suit against them, and this consent must be voluntary.

Second. A consideration of the pleadings show the purpose and effect of defendants plea is to deny jurisdiction to the District Court and prevent the appointment of a receiver. It admits all the allegations of the Supplemental Bill looking to bringing the question of jurisdiction fairly and directly before the Court; it expressly states that defendants appeared for the purpose of dismissing the bill, and for no other purpose; and it expressly states that "defendants do not consent to the jurisdiction of the Court."

Notwithstanding this effort on the part of defendants to protect their rights under the express provision of the act of Congress, and their express refusal to give consent to this attempt on the part of complainant to sue them in the United States District Court, Appellee contends that by such technical appearance, defendants consented to such jurisdiction, although in the paper writing which Appellee contends gives consent to the jurisdiction, it expressly stated that defendants do not consent to the jurisdiction.

Under no fair construction could the Bankrupt Act be given such effect. Appellee cited what it calls analogous

acts and many decisions attempting to show that the rights of defendents under the Bankrupt Act is a personal exemption liable to be waived by any technical appearance. We think that Appellee misconstrues the provision of the Bankrupt Act and its purpose. The essential difference between the Act of 1845 and 1867, and the Act of 1898 in their respective provisions giving jurisdiction to the United States District Court, and the clear purpose of this difference, shows that the consent of the defendant which is required under the Act of 1898 to give jurisdiction to the United States District Court, is more than a personal exemption. It is a right which defendants have to try the title of their property in the ordinary Courts of the land in which they are accustomed to be sued, unless they should in their volition consent to be sued in the Bankrupt Court. If this is the proper view of the act of Congress the right in question rises to something higher than a mere personal exemption, and in construing the powers of the United States District Court, it goes to the jurisdiction of that Court over the subject matter and the person, in this newly acquired power to entertain plenary action at law and suits in equity.

Appellee conceives that this jurisdiction of the United States District Court is the same, and governed by the same practice as the rights of parties under the acts of Congress regulating places where persons can be sued, and refers in his brief to the Act of 1887 amended by Act of 1888, giving jurisdiction to the several U. S. Circuit Courts, and also refers to the Act of 1875 regulating the jurisdiction in which National Banks can be sued, and sets out in his brief certain provisions of said Act. From an examination of these various acts of Congress, themselves, it is seen: that, while they are acts of general jurisdiction, the parts thereof set out by Appellee

in his brief and construed in the numerous decisions which he cites are provisions regulating the place where parties may be sued. They are simply provisions relating to *venue*.

The broad distinction is made by the Court between acts giving *general jurisdiction*, and those provisions defining the *place* where parties may be sued in Courts having general jurisdiction.

In the case of St. Louis vs. McBride, 141 U. S., 127, so strongly relied upon by Appellee, the facts are as follows: An action for damages was brought at law by a citizen of Arkansas against the defendant Railroad in the United States Circuit Court, but in the wrong district. Defendant answered and demurred, and the question presented to the Court was: did the appearance of defendant waive its right to have the suit in a different district? There the Court had complete jurisdiction of the subject matter and person with or without defendants consent, and it was simply a question of place,—of the particular district,—in which he had a right to have the case tried. The Court held that the general appearance waived the exemption as to the place of trial. The Court further said: "Its demurrer, as appears, was based on three grounds, the two referring to the jurisdiction, and the third, that the complainant did not state facts sufficiet to constitute a cause of action. It was, therefore, in the first instance, a general appearance to the merits." It is clear that the third cause of demurrer was a plea to the merits, wherein defendants attempted to obtain a judgment in its favor on the facts set forth in the complaint, and if the defendants had obtained such judgment it would have been conclusive on all parties. In the case at bar there was no such appearance or effort by defendants, but after denying jurisdiction defendants did by affidavits of alleged facts,

attempt to prevent the appointment of a Receiver of their property. It will be noted that the two causes of demurrer by defendants in this case is in no way similar to the cause of demurrer in McBride's case, which the Court held to be a plea to the merits. The demurrer in this case in no way affected the merits of the plaintiff's suit, but it was exclusively confined to the jurisdiction of the Court to entertain this suit of the complainant.

In the North Carolina Courts, pleas to the venue must be by plea in abatement, and in such instances, the practice is not to dismiss plaintiff's case, if in the wrong venue, but to remove the cause to the proper venue. This is done for the reason that the Court has general jurisdiction over the subject matter and person. Such, certainly, could not be the practice under the Bankrupt Act, Section 23 b. This distinction which we present to the Court is clearly defined in McBride's Case, *Supra.*

The Court in this case, quoting from Chief Justice Waite in the case *ex parte* Schollenberger, 96 U. S., 369, says:

> "The Act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of the defendants, and one which he may waive."

Under the Act of Congress in regard to National Banks—the Act of February 18th, 1875,—National Banks should be sued only in the counties in which the Bank is established. In the construction of this Act, appellee cites Bank vs. Charlotte, 132 U. S., page 141.

In this case the Bank was sued in the wrong county.

but appeared in the Court, pleaded to the merits, tried the case, lost it, appealed to the Supreme Court of the State, and for the first time attempted to raise the question of *venue* in the latter Court. This Court held that this provision was only a personal privilege, and waived by the conduct of defendant Bank. The question thus raised is purely one of venue and had it been properly made in the Courts of North Carolina the cause would have been moved to the proper county. These two Acts thus cited by appellee it seems to us refer to an entirely different question. In each of the Acts the Court had general jurisdiction over the subject matter of the suit and the cause, with or without the consent of any one, and the only thing forbidden, was the jurisdiction of the person in that particular place, and this objection, of course, might be taken as waived by any slight acts. But, under the Act of 1898, the Bankrupt Court is forbidden to exercise jurisdiction, not only over the person of the defendants, but over the cause, except by consent of defendants. This makes a case where a waiver will not be presumed on technical grounds, especially where defendant expressly refuses to consent to the jurisdiction.

In re Ward, Fed. Rep. 104, page 985, the Court says:

> "He appeared by counsel, and, while not absolutely denying the jurisdiction of this Court, * * * * * * yet refrained from consenting to the jurisdiction."

The Court held in that case it had no jurisdiction of the cause.

In re Nugent, Fed. Rep. 105, page 581, the Circuit Court of Appeals, of the Sixth Circuit, of its own motion, dismissed the cause for want of jurisdiction of the District

Court, and because it did not appear that defendant had consented to the jurisdiction. In the case the defendants filed affidavits alleging that he did not have the property alleged to belong to the bankrupt and various other orders were made in the cause, one sending him to jail for failure to deliver up a fund alleged to be in his hands belonging to the estate of the bankrupt, and to which defendant had replied by affidavit; and, on reviewing these orders, the Circuit Court of Appeals considered the whole proceeding as necessary to a proper determination of the appeal, and said:

> "Neither was the respondent subject to process from that (District) Court. The respondent, the bankrupt and the Trustee were all citizens of Kentucky. If the bankrupt could not have instituted proceedings in the District Court for the recovery of the money, it seems clear that the Trustee could not."

The broad distinction in the construction of the Acts of Congress of *general jurisdiction*, and those concerning the *place* where causes are to be tried, is settled by the early opinion of this Court, as appears from the following:

> "An objection to jurisdiction on the ground of exemption from the process of the Court in which the suit is brought, is waived by an appearance and pleading to issue. (Toland v. Sprague, 12 Peters, 300,) but when the objection goes to the power of the Court over the parties or the subject matter

* * * appearance does not cure the defect of judicial power, and it may be relied on by plea, answer, demurrer or at the trial."

Rhode Island v. Massachusetts, 12 Peters, 720, Law Ed. 1258.

The Court in a later case says:

"The Circuit Courts of the United States are thus vested with general jurisdiction of civil actions involving the requisite pecuniary value, between citizens of different States. Diversity of citizenship is a condition of jurisdiction, and, when that does not appear upon the record, the Court, of its own motion, will order the action to be dismissed. But the provision as to the particular district in which the action shall be brought does not touch the general jurisdiction of the Court over such a case between such parties, but affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege, which the defendant may insist upon, or may waive, at his election: and the defendant's right to object that an action within the general jurisdiction of the Court is brought in the wrong district is waived * by entering a general appearance, without taking the objection."

It is clear from the record in this case that the defendants on first appearance, raised the question of jurisdiction,

and that question being decided against them, they attempted by affidavits and exhibits to prevent the appointment of a Receiver. This, appellee contends, is a waiver of their objection made, and brings them in the Court for all purposes. On this subject defendants refer to the following decisions:

> Neither a special appearance for the purpose of objecting to the jurisdiction, and in answer to the merits after that objection has been overruled, is a waiver of the objection. Such objection is considered abandoned only when the parties plead to the merits in the first instance without insisting upon the objection.

Southern Pacific Co. v. Denton, 146 U. S., 202.
Harkness v. Hide, 98 U. S., 476.
In re Railroad Co., 164 U. S., 633.

> But the Court having ruled that it had jurisdiccion, the defendant is not bound to desert the case and leave the opposite party to take judgment by default. He is at liberty, after taking his objection, to make every defense cognizable by the Court, without forfeiting or impairing in the slightest degree his right to a trial in the proper Court.

Nat. Steamship Co. v. Tugman, 106 U. S., 118.
In re Curtis, 91 Rep., 741.
Arroyo Ditch Co. v. Superior Court, 27 Am. St. Rep., 94.

It seems to us that the true doctrine is, that when the defendants filed their plea, expressly refusing to consent to the jurisdiction of the United States District Court, the right to have their case tried in the State Courts became fixed, and anything done by them afterwards fails to deprive them of their right.

Under the provisions of the Act of March 3rd, 1891, Section 5, an appeal should be taken directly to the Supreme Court of the United States upon the question of jurisdiction purely.

But by an amendment to the act of 1891 by the act of 1895, where injunctive relief is asked, an appeal lies at once from the District Court to the Circuit Court of Appeals. But in all other cases, as was decided by this Court, an appeal could not lie from the District Court to the Supreme Court of the United States under the provisions above quoted except from a final judgment in the cause. The objection must be taken, and if overruled, case proceed.

McLish vs. Roff, 141 U. S., page 662.

This case seems conclusive of the question that where the defendants made their objection to the jurisdiction, their subsequent defense does not deprive them of their right to have their cause tried in the proper Court.

Appellee further contends that this cause does not come under the decision of Bardes vs. Bank, and urges the following:

Third—That the Bankrupt Court, being rightfully in possession of the *res*, can administer it, and can entertain this suit by the trustees against Wall & Huske to try the title to the property.

There is this difference between Bardes' case and the case at bar, to-wit: An injunction was issued by order of the Court out of the bankruptcy proceedings, restraining Wall & Huske from disposing of the stock of goods until the rights of creditors of the goods aforesaid could be tried in the proper Court, defendants remaining in possession of their property; and such was the condition when Cox brought his suit. We do not think this restraining order of the court gave it the possession of the *res*; if so, there was no need to bring the suit to get possession of the *res*.

Appellee fully understood this; but, in appellee's view of the case, in order to sustain the jurisdiction of the United States District Court to administer this property, it was necessary that the Court should be in actual possession of the *res*, and, of course, rightfully so. Thus we find an expression used by Judge Waddill in the decision of this case, heretofore referred to, construed to mean that a receiver had been appointed in the bankruptcy proceedings, and the second question certified to this Court construed to mean that a receiver was appointed in the bankruptcy proceedings, (to which error attention was called in defendants' brief.) By reason of this misconstruction, appellee boldly asserts as a fact that a receiver had been appointed in the bankruptcy proceedings, knowing that this statement was untrue; and to make this false statement appear plausible to the Court, appellee fixed the date of the alleged order appointing the receiver as November 6th, 1899; and further stated that under this order the receiver so appointed took possession of the stock of goods. Such a statement is untrue in fact, not sustained by the record, and not to be honestly drawn from the opinion of the Circuit Court of Appeals. Such sinister argument, I trust, will have no weight with this Court.

The Circuit Court of Appeals in the case at bar held that the trustee has power to bring a plenary suit to recover property in the possession of a third person, and discusses the provisions of the Bankrupt Act in regard to jurisdiction, and concludes that unless authority is given the Bankrupt Court to bring such suits, its power and usefulness is at an end. The opinion says:

> "The title to the property alleged to have been fraudulently conveyed, by the express terms of the act, as of the date of adjudication, vests in the bankrupt's trustee upon the assumption of the transfer being void, and the Bankrupt Court has, as authorized by the act, appointed a receiver to seize and take charge of the property involved, and now, in fact, holds the same."

It is seen that just what the Court below says "cannot be the law," this Court in Bardes' case says, is the law. Clearly the judge writing the above opinion does not say that the property vests in the Bankrupt Court, by the appointment of a receiver in bankruptcy proceedings, for he expressly alleges that the "title to the property by the express terms of the act * * * * vests in the Bankrupt's trustee upon the assumption of the transfer being void." The Court thus holding that the Bankrupt Act vests the property in the trustees, if the transfer by the bankrupt theretofore made, had been in fraud of creditors. The judge further says:

> "The Bankrupt Court has, as authorized by the act, appointed a receiver to seize and take charge of the property involved, and now, in fact, holds the same."

This is the clause appellee relies upon. Nowhere does it say a receiver was appointed in bankruptcy proceedings. The judge does say a receiver was appointed by the "Bankrupt Court." This is true. A receiver was appointed by the Bankrupt Court,—by the United States District Court sitting as a Court of Bankruptcy—in the cause of Cox, Trustee, vs. Wall & Huske, and took possession of the property and now holds the same. Now, would it not have been fairer to the learned judge who wrote the opinion, to suppose he was alluding to the receiver who was actually appointed as appears by the record, than to read into his opinion a statement of facts untrue in itself, and not in the record?

Throughout the opinion the judge calls the United States District Court sitting as a Court of Bankruptcy, the "Bankrupt Court," and then using this term, he says, "the Bankrupt Court appointed a Receiver." This expression enabled Appellee's counsel to write out in their brief as a fact the following: that on November 6, 1899, a receiver was appointed in the bankruptcy proceedings who took charge of the property and so had possession of the *res* at the time this suit was instituted. Not one word of which is true. Now, that the omission from the record of this alleged order appointing a receiver, may be accounted for, appellee says:

> "To show the absurdity of counsel's position, we will state that the order adjudicating Gilbert a Bankrupt and the order appointing Walter O. Cox, Trustee, and his qualification as such Trustee: the bond of Walter O. Cox, Trustee, for the maintenance of this suit as required by the acts of Congress and the orders of the District Court: none of these appear of record." * *

Appellee forgets that, while it is true that copies of orders are omitted from the record, the record expressly states the existence of all orders that were made, and of all facts necessary to present the question to the Court, and the text of such orders in full is only omitted from the record to prevent encumbering it If there had been an order in the bankruptcy proceedings appointing a receiver it would certainly have appeared in the record.

Appellee further says: The appointment in bankruptcy proceedings of a receiver on the 6th of November, 1899, "appears now as a fact found by the Circuit Court of Appeals in this second question."

The second question reads:

> SECOND. "Said district Courts having adjudicated bankruptcy on account of an alleged fraudulent transfer of the bankrupt's property, and having appointed a receiver to hold the estate thus conveyed, had it, in said proceedings, or in ancillary proceedings instituted either by the original petitioners, the receiver of the Court, the bankrupt's trustee, or of the Courts own motion, jurisdiction to bring in the alleged fraudulent transferee of the property, thus in the Court's possession, and do full and complete justice in one litigation."

The statement says that the District Court appointed a receiver. This is true as the record shows. It does not say that the appointment was in the bankruptcy proceedings as appellee contends. The questions are thus asked: had the Court in "said proceedings or in ancillary

proceedings instituted by the creditors, trustee, receiver, or by the Court's own motion, jurisdiction to bring into the Bankrupt Court an alleged fraudulent transferee?"

As heretofore contended in this brief, the series of inquiries suggested by the second question are not raised by the record, and if either of these questions pre-supposes that in the case at bar a receiver had been appointed in the bankruptcy proceedings, and by this means had the property in possession of the Bankrupt Court by a rightful process, neither the facts in the case, or the entire record of the bankruptcy proceedings, or the record now before this Court on which the questions are based, sustains it.

But, appellee contends that this second question finds a fact to exist, to-wit: that in this case a receiver was appointed of the property in the bankruptcy proceedings and took charge thereof: and that defendants are bound by the question and bound by the facts which the question contains. In reply, we respectfully suggest to the Court:

First, that the question does not find said facts to exist. Second, that a question certified for direction of this Court does not itself find facts and put them in the record, but is a question raised by facts of record. That the record is the basis of all questions, and that this Court looks to the record, and will consider only such questions as the facts of record make pertinent, and defendants are bound only by the record.

Appellee says:

> "After the election and qualification of a trustee, stock remained locked up by agreement of counsel and in the possession of the Court."

Neither true in fact, nor found in the record.

There are many more statements in appellee's brief which are not in harmony with the record in this case, to which it is unnecessary further to call the attention of the Court.

In conclusion, I would beg leave to say that the record sent to this Court presents the real question for consideration, to wit: has the United States District Court jurisdiction to entertain the plenary suit by Cox, trustee, against Wall & Huske, the purpose of which is to declare void the bill of sale from Gilbert to defendants, Wall & Huske, and to recover from them the property conveyed by said bill of sale, without the consent of the proposed defendants?

CLEMENT MANLY,

Counsel of Appellants, Wall & Huske.

APPENDIX.

SUPREME COURT OF THE UNITED STATES,
October Term, 1900.

(504.)

John D. Wall and Thomas W. Huske, trading as Wall & Huske, Appellants,

vs.

Walter O. Cox, Trustee of W. H. Gilbert, trading as Winston Hardware Company and as Gilbert Hardware Company.

AGREEMENT OF COUNSEL.

Whereas, the said cause has been advanced by the Supreme Court of the United States to be heard upon brief, it is agreed by counsel that the briefs shall be submitted as follows:

Appellants shall have fifteen days within which to prepare and submit to appellees their brief, and appellees shall have fifteen days thereafter within which to submit to appellants the brief of appellees, and that appellants shall have fifteen days thereafter within which to submit to appellees their full brief.

The briefs so prepared and exchanged shall be filed in the Supreme Court of the United States by the 10th day of April, 1901.

This February 15th, 1901.

CLEMENT MANLY,
Attorney for Appellants.

LOUIS M. SWINK,
JONES & PATTERSON,
Attorneys for Appellee.